Supreme Court, U.S.
FILED
JAN 17 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-395

UNITED STATES OF AMERICA, Petitioner

v.

HAZEL MORRISON, Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The respondent, Hazel Morrison, asks leave to file the attached Reply to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit without repayment of costs and to proceed in forma pauperis pursuant to Rule 53.

Copies of the respondent's Affidavit as filed with the Third Circuit and Appointment Order dated October 30, 1979 under the Criminal Justice Act are attached hereto.

SALVATORE J. CUCINOTTA, ESQUIRE
Counsel for Respondent
1314 Chestnut Street, 12th Floor
Philadelphia, PA 19107

FINANCIAL AFFIDAVIT

CJA 23

IN SUPPORT OF REQUEST FOR ATTORNEY, EXPERT OR OTHER SERVICES WITHOUT PAYMENT OF FEE

IN UNITED STATES IN THE CASE OF: U. S. A. vs. MORRISON, HAZEL

[ ] MAGISTRATE [ ] DISTRICT [XX] APPEALS COURT [ ] OTHER PANEL (Specify below)

FOR: the THird Circuit

AT: Philadelphia, Pennsylvania

LOCATION NUMBER: 38001

PERSON REPRESENTED (Show your full name): HAZEL MORRISON

HOME ADDRESS: c/o Mr. Moses McDuffie
5243 Pine Street, Philadelphia, Pa. 19143

CHARGE/OFFENSE (describe if applicable & check box ▪): [XX] Felony [ ] Misdemeanor
Distribution - Title 21 U.S.C. § 841(a)(1)
Aiding and abetting - Title 18 U.S.C. § 2

[ ] 1 Defendant - Adult
[ ] 2 Defendant - Juvenile
[XX] 3 Appellant
[ ] 4 Probation Violator
[ ] 5 Parole Violator
[ ] 6 Habeas Petitioner
[ ] 7 2255 Petitioner
[ ] 8 Material Witness
[ ] 9 Other (Specify)

DOCKET NUMBERS
Magistrate:
District Court: 78-00193
Court of Appeals: 78-2258

ANSWERS TO QUESTIONS REGARDING ABILITY TO PAY

ASSETS

EMPLOYMENT

Are you now employed? [ ] Yes [X] No [ ] Am Self Employed

Name and address of employer:

IF YES, how much do you earn per month? $

IF NO, give month and year of last employment
How much did you earn per month $

If married is your Spouse employed? [ ] Yes [X] No

IF YES, how much does your Spouse earn per month $

If a minor under age 21, what is your Parents or Guardian's approximate monthly income $

OTHER INCOME

Have you received within the past 12 months any income from business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, retirement or annuity payments, or other sources? Yes [ ] No [X]

IF YES, GIVE THE AMOUNT RECEIVED & IDENTIFY THE SOURCES

RECEIVED $ | SOURCES

CASH

Have you any cash on hand or money in savings or checking accounts? Yes [ ] No [X] IF YES, state total amount $

PROPERTY

Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)? Yes [ ] No [X]

IF YES, GIVE VALUE AND DESCRIBE IT

VALUE $ | DESCRIPTION: (1973) 3500 sq ft ranch house

OBLIGATIONS & DEBTS

DEPENDENTS

MARITAL STATUS — Total No. of Dependents: 6

[ ] SINGLE
[ ] MARRIED
[X] WIDOWED, SEPARATED OR DIVORCED

List persons you support and your relationship to them:
Linda Morrison, wife Morrison
Morrison, Stepdaughter
Morrison

DEBTS & MONTHLY BILLS

(LIST ALL CREDITORS, INCLUDING BANKS, LOAN CO., CHARGE ACCOUNTS, ETC.)

APARTMENT OR HOME	Creditors	Total Amt.	Monthly Pymt.
		$	$
		$	$
		$	$
		$	$

BORN TO AND DESCRIBED JUNE 196 HIS 26TH DAY F OCT. 197

I certify the above to be correct.

SIGNATURE OF DEFENDANT OR PERSON REPRESENTED: Hazel Morrison

DATE:

ELAINE GIOVANETTI
Notary Public, Phila., Phila. Co.
My Commission Expires June 28, 1982

WARNING: A FALSE OR DISHONEST ANSWER TO A QUESTION IN THIS AFFIDAVIT MAY BE PUNISHABLE BY FINE OR IMPRISONMENT, OR BOTH

APPOINTMENT AND AUTHORITY TO PAY COURT APPOINTED COUNSEL

IN UNITED STATES ☐ MAGISTRATE ☐ DISTRICT XX APPEALS COURT or ☐ OTHER PANEL (Specify below)

IN THE CASE OF: U.S.A. vs. MORRISON, HAZEL

FOR: the third Circuit

AT: Philadelphia, Pennsylvania

LOCATION NUMBER: 38001

PROCEEDING (describe briefly): Petition for Writ of Certiorari

CHARGE/OFFENSE (describe if applicable & check box →): Distribution and Aiding and Abetting — XX Felony ☐ Misdemeanor

U.S. or other code citation: Title 21 U.S.C. § 841(a)(1) ~~Title 18 U.S.C. § 2~~

1 ☐ Defendant – Adult
2 ☐ Defendant – Juvenile
3 XX Appellant
4 ☐ Probation Violator
5 ☐ Parole Violator
6 ☐ Habeas Petitioner
7 ☐ 2255 Petitioner
8 ☐ Material Witness
9 ☐ Other (Specify Below)

DOCKET NUMBERS
Magistrate:
District Court: 78-00193
Court of Appeals: 78-2258

VOUCHER NUMBER: 546061

PERSON REPRESENTED (Show full name & status, & check box →): MORRISON, HAZEL, Appellant

Name already appears as ☐ PI or as XX Of above

COURT ORDER

XX APPOINTING COUNSEL
☐ RATIFYING PRIOR SERVICE
☐ EXTENDING APPOINTMENT FOR APPEAL
☐ SUBSTITUTING COUNSEL FOR:
(name of prior counsel) (date appt'd.)

Because the above named "person represented" has testified under oath or has otherwise satisfied this court that he or she: (1) is financially unable to employ counsel, and (2) does not wish to waive counsel, and because the interests of justice so require, the attorney or organization printed here and below

Salvatore J. Cucinotta, Esquire

is hereby appointed to represent this person in the above designated case.

If appointment is made by a magistrate and the case subsequently proceeds to U.S. District Court, the appointment shall remain in effect until terminated or a substitute attorney is appointed.

The attorney or organization herein appointed is authorized to claim reimbursement on this form, subject to applicable law, administrative regulations, and the plan of the court.

Signature of U.S. Judge or magistrate

October 30, 1979
Date

OR BY ORDER OF THE COURT

(Clerk or Deputy)

CERTIFICATIONS OF ATTORNEY/PAYEE

Has compensation and/or reimbursement for work in this case been previously applied for or received? ☐ Yes ☐ No

If "Yes", how much were you paid? $

By whom were you paid?

If this is an appeal did you represent person in lower court? ☐ Yes ☐ No

FOR SERVICES & EXPENSES VOUCHERED BELOW

*	TIME SPENT	DATES	HOURS	AMOUNT
I	IN OPEN COURT			
	A. ARRAIGNMENT &/OR PLEA			
	B. MOTIONS & REQUESTS			
	C. BAIL HEARINGS			
	D. SENTENCE HEARINGS			
	E. TRIAL			
	F. REVOCATION HEARINGS			
	G. APPEALS COURT			
	H. OTHER (Specify below)			
	TOTAL "IN COURT" HOURS			$
II	OUT OF COURT			
	A. INTERVIEWS & CONFERENCES			
	B. OBTAINING & REVIEWING RECORDS			
	C. LEGAL RESEARCH & BRIEF WRITING			
	D. INVESTIGATIVE & OTHER WORK (Specify)			
	E. TRAVEL TIME (during normal office hours only): (1) TO & FROM COURT (round trips under 1 hr not allowed) (2) OTHER TRAVEL TIME (Specify)			
	TOTAL "OUT OF COURT" HOURS			$
	TOTAL COMPENSATION FOR "IN COURT & OUT OF COURT" TIME			$

RATE PER HR $ — HOURS TIMES RATE

III. ITEMIZED EXPENSES (Specify, per instruction sheet) — AMT. PER ITEM $

TOTAL ITEMIZED EXPENSES $

TOTAL COMPENSATION & EXPENSES $

*If more space is needed use additional blank sheets

DEDUCT AMOUNTS PREVIOUSLY PAID IF APPLICABLE

NET AMOUNT CLAIMED $

SIGNATURE OF ATTORNEY/PAYEE — I SWEAR & AFFIRM THE TRUTH & CORRECTNESS OF ABOVE STATEMENTS — DATE

AMOUNT CERTIFIED/APPROVED $

APPROVED FOR PAYMENT

SIGNATURE OF JUDGE/MAGISTRATE — DATE

SIGNATURE OF CHIEF JUDGE COURT OF APPEALS — DATE

Payment in excess of statutory limitation approved under 18 USC 3006A(d) (3) — AMT. APPROVED $

MORRISON, HAZEL, Appellant

Name already appears as ☐ PI or as XX Def above

☐ 1) Material Witness
☐ 2) Other (Specify Below)

VOUCHER NUMBER
546061

COURT ORDER

XX APPOINTING COUNSEL
☐ RATIFYING PRIOR SERVICE
☐ EXTENDING APPOINTMENT FOR APPEAL
☐ SUBSTITUTING COUNSEL FOR:
(name of prior counsel) (date app'd.)

Because the above named "person represented" has testified under oath or has otherwise satisfied this court that he or she: (1) is financially unable to employ counsel, and (2) does not wish to waive counsel, and because the interests of justice so require, the attorney or organization printed here and below

Salvatore J. Cucinotta, Esquire

is hereby appointed to represent this person in the above designated case.

If appointment is made by a magistrate and the case subsequently proceeds to U.S. District Court, the appointment shall remain in effect until terminated or a substitute attorney is appointed.

The attorney or organization herein appointed is authorized to claim reimbursement on this form, subject to applicable law, administrative regulations, and the plan of the court.

Signature of U.S. Judge or Magistrate

October 30, 1979
Date

OR BY ORDER OF THE COURT

(Clerk of the court)

FOR SERVICES & EXPENSES VOUCHERED BELOW

* TIME SPENT	DATES	HOURS	AMOUNT
I IN OPEN COURT			
A. ARRAIGNMENT &/OR PLEA			RATE PER HR $ — HOURS TIMES RATE
B. MOTIONS & REQUESTS			
C. BAIL HEARINGS			
D. SENTENCE HEARINGS			
E. TRIAL			
F. REVOCATION HEARINGS			
G. APPEALS COURT			
H. OTHER (Specify below)			
TOTAL "IN COURT" HOURS			$
II OUT OF COURT			
A. INTERVIEWS & CONFERENCES			$
B. OBTAINING & REVIEWING RECORDS			
C. LEGAL RESEARCH & BRIEF WRITING			
D. INVESTIGATIVE & OTHER WORK (Specify)			
E. TRAVEL TIME (during normal office hours only): (1) TO & FROM COURT (round-trips under 1 hr not allowed) (2) OTHER TRAVEL TIME (Specify)			
TOTAL "OUT OF COURT" HOURS			$
TOTAL COMPENSATION FOR "IN COURT & OUT OF COURT" TIME			$

III. ITEMIZED EXPENSES (Specify, per instruction sheet) — AMT. PER ITEM $

TOTAL ITEMIZED EXPENSES $

TOTAL COMPENSATION & EXPENSES $

*If more space is needed use additional blank sheets

DEDUCT AMOUNTS PREVIOUSLY PAID IF APPLICABLE

NET AMOUNT CLAIMED $

CERTIFICATIONS OF ATTORNEY/PAYEE

Has compensation and/or reimbursement for work in this case been previously applied for or received? ☐ Yes ☐ No

If "Yes", how much were you paid? $

By whom were you paid?

If this is an appeal did you represent person in lower court? ☐ Yes ☐ No

SIGNATURE OF ATTORNEY/PAYEE — I SWEAR & AFFIRM THE TRUTH & CORRECTNESS OF ABOVE STATEMENTS — DATE

AMOUNT CERTIFIED/APPROVED

APPROVED FOR PAYMENT

SIGNATURE OF JUDGE/MAGISTRATE — DATE

SIGNATURE OF CHIEF JUDGE COURT OF APPEALS — DATE

Payment in excess of statutory limitation approved under 18 USC 3006A(d) (3) AMT. APPROVED $

COUNSEL
XX IS A PRIVATE ATTORNEY
IS FURNISHED BY:
☐ COMMUNITY DEFENDER ORGANIZATION
☐ BAR ASSOCIATION OR LEGAL AID AGENCY

PHONE NO. 215 - 732 - 3311
215 - 732 - 2323

VOUCHER NUMBER 546061

SOCIAL SECURITY NO. 170-36-5823

ATTORNEY
ORGANIZATION
Salvatore J. Cucinotta, Esquire

ADDRESS
12th Floor, 1314 Chestnut Street
Philadelphia, Pennsylvania

ZIP CODE 19107

AT TIME OF APPOINTMENT PLEASE TYPE OR PRINT CLEARLY THE NAME OF ATTORNEY OR ORGANIZATION (PAYEE) AND THE ADDRESS TO WHICH CHECK SHOULD BE MAILED

COPY 1-MAIL TO ADMINISTRATIVE OFFICE AFTER SERVICE RENDERED

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-395

UNITED STATES OF AMERICA, Petitioner

v.

HAZEL MORRISON, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENT'S REPLY IN OPPOSITION

SALVATORE J. CUCINOTTA, ESQUIRE
Counsel for Respondent

12th Floor, 1314 Chestnut Street
Philadelphia, PA 19107

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-395

UNITED STATES OF AMERICA, Petitioner

v.

HAZEL MORRISON, Respondent

RESPONDENT'S REPLY TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Counsel for the respondent respectfully urges this Most Honorable Supreme Court that the Petition For A Writ of Certiorari be denied.

I. OPINION BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 602 F.2d 529.

II. JURISDICTION

On December 13, 1979, the Clerk of the Supreme Court of the United States extended the time within which to file a response to the Petition For A Writ of Certiorari to and including January 16, 1980. There is no dispute that this Court has jurisdiction. 28 U.S.C. §1254(1).

III. COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether review is necessary when charges are dismissed to protect the adversary system where the Government attempts to

disparage the competence of defense counsel in favor of another attorney more sympathetic to the Government's interests on the eve of trial?

IV. COUNTER-STATEMENT OF THE CASE*

Respondent, Hazel Morrison, was arrested on May 17, 1978 and charged with illegally distributing heroin on April 12, 1977 and May 10, 1977. Before her trial she filed a Motion to Dismiss the Indictment with Prejudice based on a denial of her Sixth Amendment right to counsel which was heard on September 5 and 6, 1978 and denied. The motion concerned the nature of two direct counselless interviews conducted by Drug Enforcement Agency (D.E.A.) agents occurring over the course of three days. At the end of the hearing on the motion, the respondent entered an open conditional guilty plea to one count of distribution, contingent on appealing the denial of her aforesaid motion to the Third Circuit Court of Appeals.

On October 10, 1978, she was sentenced to five years imprisonment with a special parole term of three years to follow. The respondent appealed to the Third Circuit Court resulting in the dismissal of the charges. The Government now brings the instant Petition For Certiorari from the dismissal. The respondent's counter-statement of facts is as follows.

For the purpose of pre-trial negotiations and discovery, defense counsel Salvatore J. Cucinotta, Esquire met with Assistant United States

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*There can be no dispute as to the facts in the case. The following is merely a more detailed statement than presented in the Government's Petition.

Attorney John E. Riley and D.E.A. agent Dennis Malloy on May 31, 1978 (Tr. 106/App. 121a).[1]

After May 31, 1978 another D.E.A. agent, Stephen Hopson, contacted agent Malloy for the purpose of interviewing Ms. Morrison and returning the personal property found in respondent's automobile (Tr. 107/App. 122a), without advising the Assistant United States Attorney or defense counsel. Agent Malloy knew that Hopson wanted "to solicit her [the accused's] cooperation in his particular investigation," and that Hopson would "negotiate" directly with the accused (Id.). To assist in his negotiations, agent Hopson discussed the pending charges "generally" with Malloy (Tr. 109/App. 124a). He examined Malloy's file (Tr. 20/App. 36a), which directly related to her impending September 5, 1978 trial and determined who the trial judge would be (Tr. 109/App. 124a). Agent Hopson also spoke to Assistant United States Attorney John E. Riley, the Government's trial counsel, before speaking, negotiating and interrogating the responding at her home (Tr. 21/App. 37a). Hopson did not inform Riley of his plan to contact Ms. Morrison.

By August 11, 1978, Assistant United States Attorney G. Daniel McCarthy replaced Riley as the Government's trial counsel. On Wednesday, August 23, 1978, D.E.A. agents Hopson and Bradley, without the knowledge or consent of defense counsel or the United States

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[1] All page citations refer to notes of testimony in the transcript (Tr.) in the lower court, and/or the Appellant's Appendix (App.) filed in the Third Circuit.

Attorney's office, went to the home of the respondent. (Government's Memorandum of Law in Support of its Answer to Defendant's Motion to Dismiss the Indictment with Prejudice, p.2/App. 3a). Greeted by the respondent's children, the agents obtained entry into the respondent's home (Tr. 150/App. 164a). They were not invited in (Tr. 130/App. 145a). When respondent came downstairs from her bedroom, the agents asked her whether they could sit down with her in the dining room. (Id.)

Agent Hopson told respondent that he wanted to discuss the pending charges against her (Tr. 112, 132/App. 127a, 146a) and how he could help her with regard to her case. Finding Ms. Morrison reticent to their overtures, the agents altered their tactic, choosing to subvert her confidence in her lawyer. Hopson stated: "Your lawyer is going to make a asshole out of hisself and you, too, in the courtroom . . . . [i]f you decide to fight your case . . . [sic]." (Tr. 112/App. 127a, see also Tr. 152, 156, 161/App. 166a, 170a, 175a). She then was questioned as to the source of her heroin in April and May of 1977 (Tr. 134/App. 148a), but again, to no avail.

Resisting these inquiries, the agent reminded her that she was going to trial before the worst "son of a bitch" trial judge in the federal system (Tr. 113/App. 128a). This intimidation also failed. Returning to their attempt to subvert her confidence in her counsel, she was told that the only thing her attorney was interested in was his fee (Tr. 113/App. 128a, Tr. 152/App. 166a, Tr. 153/App. 167a) and not whether she would win her case (Tr. 162/App. 176a).

The agents, trying another tactic, promised repondent a job and another place to live if she cooperated (Tr. 161/App. 175a). She resisted. To undermine her resistance, the Agents played upon Ms. Morrison's emotional and maternal ties to her children, asking her to consider the fate of her children if she failed to cooperate and was incarcerated (Tr. 162/App. 176a, G-2/App. 15a, G-3 cassette tape). Hopson then handed her a piece of paper with his phone number if she decided to change her mind and save herself (Tr. 114/App. 129a).

Concerned, upset and shaken by this surreptitious visit, Ms. Morrison immediately called her attorney who went to the respondent's residence post haste. In the presence of counsel and his investigator, respondent called Agent Hopson and tape recorded her side of the conversation,[2] stating:

> I'm calling you back because I was thinking about what you was talking about. I want to know, what do I really have to do, since my lawyer can't help me? I mean what I'm trying to find out is, the person that you named, that's the only thing that you want me to do? Between 12:00 and 1:00 o'clock, you'll be . . . all right. Think it over, I did, well I thought it over when you left, when you got to talking about my kids. Between 12:00 and 1:00.

Plans were made to meet with the agents again between 12:00 and 1:00 P.M. on the next day because Ms. Morrison wanted her

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[2] Although the Government utilized taped phone conversations of Ms. Morrison to prove the criminal charges, she could not tape the conversation of the D.E.A. agents to memorialize their activities without violating the Commonwealth of Pennsylvania's wiretapping law. 18 Pa. Cons. Stat. Ann. §5702 et seq.

investigator "to be at my house to hear some of the things that Steve Hopson was saying to me because I felt like my word wouldn't go far in a courtroom against an agent, a Government agent." (Tr. 127/App. 142a).

On Thursday, August 24, 1978, agents Hopson and Bradley unexpectedly arrived between 5:00 and 6:00 P.M. (Tr. 125/App. 140a). They were greeted by the respondent's son, Otis Morrison, Jr. Hopson stuck his foot in the door and tried to push it open before the respondent could arrive at the door (Tr. 155/App. 169a). When she came to the door, she told the agents that she had company and could not speak to them at the time. She also told them that she wanted her attorney present (Tr. 144/App. 158a). They left.

On Friday, August 25, 1978, the respondent again was unexpectedly visited for a third time. After learning that her counsel was in Pittsburgh (Tr. 14/App. 30a) the Agents told her that if she did not cooperate fully with them they would "bust" her "ass" (Tr. 128/App. 143a). They also stated that defense counsel could do nothing for her unless the respondent agreed to cooperate with the Agents (Id.). Continuing the intimidation, she was reminded that it would be her "goddamn ass that is going to jail" because her trial judge "hated black people" (Tr. 129/App. 144a). Failing to convince her to change her defense counsel and cooperate with the Government, the Agents became "perturbed" and "angry" (Tr. 102-3/App. 117-8a). She was finally told that she could not wait until the last minute to cooperate and that if she did, agent Hopson would "fango" her counsel (sic, phonetic) (Tr. 130/App. 145a). Respondent

resisted these intimidations and threats.

On August 30, 1978 the respondent filed a Motion to Dismiss the Indictment with Prejudice requesting a dismissal of the charges against her on the grounds the aforedescribed conduct of the D.E.A. agents constituted an interference with her Sixth Amendment right to counsel and a denial of due process. The Government's answer to said motion admitted that the agents had made contact with the respondent but that they did not seek to learn where the respondent's heroin supply came from in April or May of 1977, but rather they sought information regarding her source "from the early 1970's to 1976." (Answer to Defendant's Motion to Dismiss the Indictment With Prejudice, paragraph 7, App. 6a). The Government's answer also indicated that the "agents specifically advised the defendant that they did not want to talk about her outstanding case." (Id.). The Government's Memorandum further admitted that "without advising defense counsel, the Government during the aforesaid week (August 23, 1978) attempted to induce the defendant to become an informant and to cooperate with the Federal Agents in their on-going investigation of traffic in narcotics." (paragraph 8 of Answer/App. 7a). The Government denied, however, that the effectiveness of defendant's trial counsel was ever discussed between the agents and the respondent. (paragraph 9 of Answer/App. 7a). The Government also conceded that the agents erred "in attempting to elicit the cooperation of Morrison without working through her attorney" as was done initially in May of 1978 (p. 2-Government's Memorandum of Law in Support of its Answer to Defendant's Motion to Dismiss the Indictment with Prejudice/App. 3a).

On August 31, 1978, respondent entered into an agreement with the Government whereby she would waive all her pre-trial motions, jury selection and trial rights and enter a plea to one count of the indictment as long as she could have a hearing on her Motion to Dismiss which could be appealed to the Third Circuit Court of Appeals if denied by the trial judge.[3]

On September 5, 1978, defense counsel and respondent appeared in court ready for a hearing on the Motion. Based upon the Government's answer to the motion, Government testimony was expected to show that no discussions were held between the agents and the defendant relevant to (a) her trial, or (b) the competency of her trial counsel. (See Answer to Defendant's Motion to Dismiss the Indictment with Prejudice at paragraph 7, and pages 1 and 2 of Government's Memorandum of Law in Support of its Answer to Defendant's Motion to Dismiss the Indictment with Prejudice at App. pp. 6a to 7a and pp. 8a to 9a, respectively). When defense counsel appeared in court, he brought a cassette tape recorder and several tapes, two of which were labeled "HOPKINS [sic] - PHONE" and "HOPKINS [sic] - AUG. 25." The tapes were conspicuously placed on his counsel table along with his defense file, folders and notes. Defense counsel expected to utilize a third tape containing the one-sided phone call of Ms. Morrison and transcription of same during the hearing on the motion (G-2 App. 15a and G-3, a cassette tape). Noticing the labeled tapes and the recorder, the Government's

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[3] Use of the conditional guilty plea was condoned in United States v. Zudick, 523 F.2d 848 (3rd Cir. 1975).

first witness, D.E.A. agent Hopson, advised the Assistant United States Attorney G. Daniel McCarthy that "he believed that the tape recordings resulted from illegal wiretapping and eavesdropping." (See Affidavit of Probable Cause for Warrant #36688 at App. 13a-14a).

When agent Hopson took the stand, he had difficulty recalling what transpired between him and the respondent at her home. He was generally unsure, if he was not "mistaken" in his recollection (Tr. 19/App. 35a). For example, in the first twenty-one pages of his testimony he could not recall or equivocated in his answers to over ten questions. Agent Hopson took the stand and testified, inter alia:

Q. [By Mr. McCarthy] Did you ask her anything about her case?

A. Definitely not. (Tr. 10/App. 26a).

* * *

Q. Did you say anything about that case?

A. Not that I recall.

* * *

Q. Did she discuss with you anything about her case?

A. No sir. (Tr. 12/App. 28a).

* * *

Q. In that telephone conversation on August 23 in the late afternoon, did you discuss her case with her at that time?

A. Not that I recall. (Tr. 14/App. 30a).

* * *

But later, the Agent would "recall" and contradict his previous testimony:

Q. Did you at any time during these three contacts with Mrs. Morrison discuss with her anything about this case?

A. No sir, not specifically. (Tr. 15/App. 31a) (Emp. Sup.).

The agent admitted that he was attempting to acquire an "off-the-record offer" of what she could do (Tr. 16/App. 32a) without the knowledge of her attorney.

Q. In that telephone conversation on August 23 in the late afternoon, did you discuss her case with her at that time?

MR. CUCINOTTA: Objection.

THE COURT: Overruled.

THE WITNESS: Not that I recall (Id.).

During cross-examination Hopson testified that the original Assistant United States Attorney assigned, Mr. Riley, "may have" spoken to him on several occasions regarding Hazel Morrison (Tr. 18/App. 34a), but that he could not "recall exactly" (Id.). He said he did not need any additional information to assist his investigation from Agent Dennis Malloy; that he was aware of the charges against her before going to see her (Tr. 23/App. 39a); and that he wanted to "help her" with respect to those charges (Tr. 25/App. 41a). He explained that he could help her get "probation" because of the likelihood of her going to jail (Tr. 27/App. 43a).

Hopson's testimony then recalled that later on the same day he received a phone call from the respondent which he remembered only in general terms (Tr. 30/App. 46a). Defense counsel then handed the Assistant United States Attorney a transcript of the accused's conversation, later marked G-2 (App. 15a), to be used in an effort to refresh the memory of the agent. At side bar, the Assistant United States Attorney objected and asked that all tapes and the recorder on defense counsel's desk be seized and confiscated for Commonwealth prosecution under the local wiretap law (Tr. 30/App. 46a). Defense counsel advised the Court that use of the transcript, G-2, would be to "refresh the memory of the Agent" (Tr. 31/App. 47a). He also represented to the Court that the transcript was not a violation of the law. Defense counsel then saw the agent "overhearing the conversation" with the Judge at side bar (Tr. 31/App. 47a) (Id.). Although the trial court stated the witness could not hear the conversation (Id.), a subsequent search warrant for defense counsel's files, briefcase (Tr. 61/App. 77a), tapes and tape recording device indicated that the agent was eavesdropping on the side bar colloque. (Search Warrant, Affidavit p. 1/App. 13a).

Defense counsel renewed his argument for permission to use G-2 to refresh the agent's memory, stating to the court:

> Part of the evidence [against the accused] is tape recordings which were consentually utilized to convict her; yet, in the same position, she may not be able to do exactly what the agents did in this particular case; that is why she did not do what the agents did . . . because for her to . . . [tape record unconsented conversations] would be illegal and I would ask to be able to continue to cross-examine Agent Hopson with respect to the second contact

that he had without any permission and without contacting defense counsel [(Tr. 41/App. 57a)] and without the knowledge of the United States Attorney's office.

THE COURT: Stop making a speech and stick to the law, if you please. (Tr. 42/App. 58a). (Emp. Sup.)

The Court refused to allow defense counsel the opportunity to use G-2 to assist the agent's memory (Tr. 42/App. 58a).

Hopson testified that the defendant called him to have him repeat how he could help her more than her attorney (Tr. 42/App. 58a). Seeing her a second time, he discussed the likelihood of her winning the case (Tr. 48/App. 64a) and that she could receive a severe sentence, if she did not cooperate (Tr. 46/App. 62a).

The Government continued to attempt to discover what was contained on the tapes on defense counsel's desk (Tr. 48/App. 64a) seized by the Court under protest (Tr. 49/App. 65a) before any agents continued to testify. After a recess, the court directed defense counsel to obtain a lawyer for himself (Tr. 50/App. 66a), but defense counsel advised the court of a federal case indicating that G-2 was not illegal (Id.).[4] Still, the Government attempted to warn counsel of his Miranda arrest rights (Tr. 51-52/App. 67a-68a), and the Assistant United States Attorney agreed that it would be necessary to listen to the tapes to determine whether or not the conversations of agents Bradley and Hopson were recorded (Tr. 52/App. 68a). Defense counsel's opportunity to respond to the

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[4] Parkhurst v. Kling, 266 F. Supp. 700 (E.D.Pa. 1967).

Government's position, was interrupted by the trial court who admonished counsel to "stop right there" (Tr. 53/App. 69a). Notwithstanding the court's admonishment, defense counsel stated for the record:

> [t]he only reason G-2 was utilized . . . was to help a witness remember what was said over a telephone conversation which he said was--initially he could not recall. The background as to the source of G-2 is only coming into the record as a result of this good Court's inquiries; and furthermore, there has been a confiscation, actually a seizure, of a tape recorder and two tapes that were on my desk[(Tr. 54/App. 70a)]. How the United States Attorney figures that they were relevant, I don't understand, but it was actually seized (Emp. Sup.) (Tr. 55/App. 71a).

The Assistant United States Attorney then represented to the court that he had "probable cause and a reasonable basis to believe that the contents of those tapes" violated Pennsylvania law (Tr. 55/App. 71a), when only minutes before he believed "that there is a possible violation of state law" (Tr. 52/App. 68a). "That is inaccurate" defense counsel advised the court (Tr. 55/App. 71a); yet, the prosecutor continued his efforts to discover what was contained on the confiscated tapes because "Mr. Cucinotta is unwilling to tell us whether or not the agent's voice is on those tapes . . . ," despite counsel's position that what was confiscated was "irrelevant" (Tr. 61/App. 77a).

The Court recessed and would not resume until defense counsel had his attorney present (Tr. 63/App. 79a). Members of the Philadelphia District Attorney's Office arrived with a signed search warrant in hand and were ready for execution of the warrant

(Tr. 67/App. 83a). They requested permission from the court for immediate seizure of the tapes (Tr. 68/App. 84a) which was denied (Tr. 69/App. 85a).

The first day of testimony ended with the request that the stipulated sequestration of Government agents remain in force; and that the Government not be given access to the confiscated tapes overnight (Tr. 70/App. 86a).

The second day of the hearing opened with the filing of a written Government Motion for the Release of Impounded Tapes and Recording Equipment and they argued in support of the request (Tr. 79/App. 95a). Counsel for Mr. Cucinotta again advised the court that no violation of law had occurred (Id.), but the Government continued its attempt to "be permitted to listent to the tapes . . . so that we would not waste the time of the court . . ." before continuing testimony (Tr. 80/App. 96a).

When it was decided that the tapes would be heard after the hearing, testimony on the defense Motion to Dismiss continued with the unexpected recall of agent Hopson, called "in the interest of justice" (Tr. 87/App. 102a). It will be recalled Hopson had already testified he had contact with the Assistant United States Attorney then in charge, John Riley, before contacting the defendant, and that he told her, "similar to the first meeting," (Tr.14/App. 30a) to contact her lawyer. Retaking the stand, however, he stated that he told her she should acquire a Public Defender (Tr. 89/App. 104a) because she could save the money (Id.).

He stated that he knew her defense attorney, but did not recall the type of representation she could acquire from her defense counsel (Tr. 89-90/App. 104a-105a).

Agent Bradley took the stand and stated that both he and Hopson knew who her lawyer was "at the first meeting . . . ." (Tr. 103/App. 118a). He recalled the use of bad language in the meeting with the defendant (Tr. 103/App. 118a), as did the respondent and her children.

Agent Dennis Malloy testified that he met the respondent's attorney along with the Assistant United States Attorney as early as May of 1978 (Tr. 106/App. 121a). He recalled how agent Hopson wanted to talk to the respondent. He "[i]n the normal course of working with the D.E.A.,[Malloy] . . . expected that Agent Hopson would negotiate with . . ." the respondent (Tr. 108/App. 123a); and that Hopson knew who the defendant's attorney was (Tr. 109/App. 124a) and that when he returned from the meetings with the defendant, Hopson reported that "nothing had transpired of use to either of us at that time" (Emp. Sup.) (Tr. 108/App. 123a). At the conclusion of the hearing, the Commonwealth and Federal prosecutors listened to the confiscated tapes and concluded that no violation of law had occurred (Tr. 178/App. 191a) as defense counsel had been indicating to them all along.[5]

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[5] The two tapes contained a recording of a Christmas Party and a law school lecture (Tr. 180/App. 193a).

V. REASONS FOR DENYING THE PETITION

SUMMARY OF ARGUMENT

A. THE OPINION OF THE THIRD CIRCUIT COURT OF APPEALS DISMISSING THE INDICTMENT WITH PREJUDICE IS NECESSARY, JUST AND IN CONFORMITY WITH ALL REPORTED CASES OF IDENTICAL GOVERNMENT MISCONDUCT.

B. THE OPINION IS IN CONFORMITY WITH THE LAW AS EXEMPLIFIED IN THE DECISIONS OF CASES INVOLVING SIMILAR BUT LESS EGREGIOUS CONDUCT.

C. THE THIRD CIRCUIT'S RULING REMEDIES THE ONGOING GOVERNMENTAL MISBEHAVIOR IN THE CASE IN CHIEF AND IN OTHER REPORTED AND UNREPORTED CASES.

A.

The opinion of the Third Circuit Court of Appeals dismissing the indictment with prejudice is necessary, just and in conformity with all reported cases of identical government misconduct. The facts set forth above are undisputed. The Government intentionally, repeatedly and surreptitiously contacted the accused to induce her to abandon her defense and her counsel; and cooperate with the Government and defense counsel of the Government's choice. This process totally ignores and flaunts the historical, jurisprudential and democratic raison d'etre of criminal defense counsel and the adversary system, which can only be preserved by a dismissal of the charges.

The respondent submits that the charges against her must be dismissed with prejudice. No other remedy is adequate to rectify the Government's disregard of our adversary system as held in Commonwealth v. Manning, 359 N.E.2d 51 (App.Ct. 1977), rev., 367 N.E.2d 635 (Mass. S.Ct. 1977); People v. Moore, 57 Cal.App.3rd 437, 129 Cal.Rptr. 279 (1976); People v. Mason, 97 Misc.2d 706, 411 N.Y.S.2d 970 (1978); see also, Via v. Cliff, 470 F.2d 271 (3rd Cir. 1972).

In Manning, supra, the defendant was charged with selling drugs to a D.E.A. agent. On the eve of trial, August 22, 1974, D.E.A. agent Marchand merely telephoned the defendant at work without the knowledge or permission of the defendant's attorney to "'induce the defendant to become an informer and to cooperate with the Federal Agents in their ongoing investigation of traffic in narcotics.'" Id., 359 N.E.2d at 52. This is exactly what agents Hopson and Bradley attempted to do to respondent Morrison. Furthermore, during the course of the conversation, D.E.A. agent Marchand made several disparaging remarks about the defendant's counsel and the manner in which he was conducting the defense. He urged Manning to cooperate with the D.E.A. D.E.A. agent Marchand "indicated that the tactics of defense counsel would not insure the defendant being kept out of jail." Id.

In keeping with what the D.E.A. did in 1978 to Ms. Morrison:

> On August 23 [1974] the defendant, in the presence of his counsel, telephoned Marchand's office. Marchand was not in, and the defendant spoke with another D.E.A. agent identified only as "George". This second D.E.A. agent "in substance adopted the same line of conversation as agent Marchand had the previous day, speaking disparagingly of the tactics being pursued by counsel for the defendant and urged the defendant to cooperate with the Federal agents."

Manning, supra, 359 N.E.2d at 53.

The Appeals Court of Massachusetts reversed Manning's conviction and felt that a new trial should be ordered and the defendant allowed new counsel to be paid for by the State, without regard to indigency. This, the appeals court felt, would cure what had occurred.

Manning contended, as does your respondent, that allowing for a new trial and free defense counsel would specifically allow the Government to circumvent due process and the Sixth Amendment right to counsel. For "[i]n all criminal prosecutions, the accused shall enjoy the right to have assistance of counsel for his defense." This right is a fundamental right to the concept of due process. Powell v. Alabama, 287 U.S. 45, 67-68 (1932).

Noting this contention in Manning, Justice Brown concurred only because of "[t]he fact that the officers guilty of misconduct were agents acting entirely independently of state law enforcement officials in approaching the defendant." Otherwise, he commented:

> I believe we should consider the implementation of a prophylactic rule in which the indictment against the defendant is dismissed where there was deliberate misconduct on the part of the law enforcement officers or prosecutors which interfered with the defendant's right to the effective assistance of counsel. Such a rule would likely have a stronger inhibiting effect on future police and prosecutorial conduct of this kind. See generally, Interrogatories in New Haven: The Impact of Miranda, 76 Yale L.J. 1519, 1550-1554 (1967).
>
> The defendant may also have available to him a civil action against the D.E.A. agents alleging interference with the attorney-client relationship. [Citations omitted].

359 N.E.2d at 56.

Parenthetically, one notes that the Third Circuit treated a civil rights claim which captures part of Justice Brown's reasoning. In Via v. Cliff, supra, the plaintiff alleged that his consultations with his attorney while in jail awaiting trial had been deliberately obstructed and cut short by jail officials. The Court held that if the officials' interference was either wrongfully motivated or without adequate justification, the plaintiff had established an

infringement of his constitutional right to counsel and need not additionally prove resultant prejudice. Id., 470 F.2d at 275.

When the appellate decision in Manning was appealed to the Massachusetts Supreme Court, the supreme court agreed that no prejudice need be shown. They also determined that Justice Brown's factual distinction that D.E.A. agents were involved together with innocent state investigators was irrelevant. The supreme court addressed the "sole issue of whether a new trial was the appropriate remedy for the constitutional violations found . . . ." Commonwealth v. Manning, 367 N.E.2d 635, 637 (1977) and the court concluded that the indictments should be dismissed as to both counts with prejudice. "The undisputed facts of the case show willful interference with Manning's constitutional right to counsel by two Federal officers who worked closely with the state prosecutor." Id. Continuing, the Court said:

> As a general rule, "any violation of a constitutional right gives rise to presumptive prejudice, which normally requires a reversal of the conviction, in the absence of an affirmative showing by the Commonwealth that the error was harmless." [Citations omitted]. In the case now before us, we need not invoke a presumption of prejudice, as implicit in the motion judge's finding that there had been no "serious" impairment of the attorney-client relationship is a finding that the defendant had in fact been prejudiced to some extent. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, 315 U.S. 60, 76, 62 S.Ct. 457, 467, 86 L.Ed 2d 680 (1942). See, e.g., Geders v. United States, 425 U.S. 80,96 S.Ct. 1330, 47 L.Ed 2d 592 (1976); O'Brien v. United States, 386 U.S. 345, 87 S.Ct. 1158, 18 L.Ed 2d 94 (1967); Black v. United States, 385 U.S. 26, 72 S.Ct. 190, 17 L.Ed 2d 26 (1966). We think the application of the harmless error rule singularly inapposite here.

> Further, we are of the opinion that the facts of the case demand that the indictment against the defendant be dismissed. We are confronted in this case not with the proverbial constable's blunder or even with good faith overzealousness in the pursuit of legitimate law enforcement aims. Rather, we have here a deliberate and intentional attack by government agents on the relationship between Manning and his counsel in a calculated attempt to coerce the defendant into abandoning his defense. While a balancing test may be appropriate in determing the proper scope of judicially created exclusionary rules, see, e.g., United States v. Janis, 428 U.S. 433, 454, 96 S.Ct. 3021, 49 L.Ed 2d 1046 (1976); United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed 2d 561 (1974), we do not think it the proper cause in the circumstances of this case. [Footnotes omitted].
>
> This focus must be rather on the remedy necessary to cure the impairment . . . , [367 N.E.2d at 637][T]he officers' misconduct was so pervasive as to preclude any confident assumption that proceedings at a new trial would be free of the taint.
>
> Further, another trial, even if Manning is provided with counsel at public expense, may subject him to an inexcusable risk of a more severe sentence were he reconvicted. We think the grant of a new trial is of dubious, if any benefit to the defendant. We also think that a stronger deterrent against the type of conduct demonstrated here is necessary. [Emp. Sup.].
>
> Prophylactic considerations assume paramount importance in fashioning a remedy for deliberate and intentional violations of constitutional rights. Such deliberate undermining of constitutional rights must not be countenanced. The specific misconduct present in this case is particularly troublesome because only when the importunings of government agents are unsuccessful will the matter come to the attention of the courts, and there is, in turn a grave danger that the courts themselves may become the instrumentality through which the government agents may effectuate threats to defendants regarding the consequences of asserting constitutional rights.

367 N.E.2d at 638.

In the case now before the Court, one immediately sees how the court became an instrumentality threatening the accused's right to counsel. How intimidating and revealing it was as the Government seized irrelevant tapes from counsel's desk?

Continuing in Manning:

> It may be that the only way to prevent such offensive and deliberate manipulation of criminal defendants is to formulate a per se rule which would mandate the dismissal of an indictment in cases in which government agents intentionally attempt to subvert the attorney-client relationship and the defendant's right to a fair trial. In the case now before us, we find it unnecessary to adopt such a rule. The indictment itself is so inextricably interwoven with the misconduct which preceded it that the only appropriate remedy here is to dismiss the indictment. However, while we at this time adopt no rule of general applicability, we wish to leave no doubt that such conduct will not be tolerated in our criminal justice system.

In People v. Moore, 129 Cal.Rptr. 279, 57 Cal.App.3rd 437 (1976), after the defendant was arrested and unbeknownst to the defense counsel, "[a] beautiful investigator of the district attorney's investigation unit, Ms. Casey," contacted the defendant to assist in criminal investigations. Subsequently, after being told his attorney was inadequate, he began to cooperate. 129 Cal.Rpts. 279, 281. The Moore case cites a series of subsequent activities which could have occurred in Manning and to the respondent Morrison, if the importunings of the D.E.A. were successful. The court wrote:

> The People claim Moore was not denied aid of counsel at a critical stage of criminal proceedings because no plea bargain was achieved, and their use of Moore was for purposes unrelated to his own case. The People overlook the offers and assurances the district attorney's office gave Moore as to his own case.
>
> [T]he meager benefits Moore received from his unaided bargaining, underscore the prejudicial effect of acting without counsel . . . .[129 Cal.Rpts. at 281].
>
> At oral argument the People likened their intrusion into Moore's relationship with his attorney to a violation of the rights announced in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed 2d 694. They argue Moore's remedy is to exclude from his trial any evidence gained by their acts in that regard.

> This is not a case where the People have merely failed to advise a defendant of his rights to counsel and have gained evidence from one who has not knowingly waived his right to counsel. What results from a violation of Miranda rights is tained evidence, and the exclusionary rule is adequate to cope with the violation.
>
> Here the People actively interfered with an attorney-client relationship established to defend Moore against the charges for which he had been jailed. Resort to a rule of evidence cannot reasonably remedy violations of Moore's right to counsel which go to the very conduct of his defense. It is not evidence which has been tainted, rather, it is Moore's right to due process.
>
> Due process is not a yardstick of definite value, but rather is an embodiment of the traditional notions of fair play and justice (Rochin v. People of California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed 183). It is clearly violated when a defendant is denied counsel in criminal proceedings (People v. Mora, 120 Cal.App.2d 896, 900, 262 P.2d 594; Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed 2d 799), but may also be denied under circumstances which do not include an outright refusal to provide counsel.

129 Cal.Rpts. at 282. (Emp. Sup.).

The charges remained dismissed and the judgment of the trial court was affirmed.

In People v. Mason, 97 Misc.2d 706, 411 N.Y.S.2d 970 (Sup.Ct. 1978), the defendant was told to cooperate with the D.E.A. Defense counsel even complained to the court, but the D.E.A. persisted and indicated that the defendant's attorney was "young, inexperienced, and clearly no match for" the prosecutor, 411 N.Y.S.2d at 973; the defendant subsequently became an informant based on promises of probation which the sentencing law disallowed. The charges were dismissed because of the violation of the Sixth Amendment.

In sum, the reported cases that are on all fours with the case at bar resulted in a dismissal of the charges without a showing at

prejudice. No prejudice need be shown because of the magnitude of the infringement of the right of counsel in this case. The Government intruded on this right without a waiver by respondent. Regardless of whether or not the intrusions "were wholly unrelated to the criminal charges pending," Moore, supra, 129 Cal.Rptr. at 282, a waiver of counsel must be "an intentional relinquishment of a known right," Johnson v. Zerbst, 304 U.S. 458, 464 (1939), and must be made "completely and intelligently," Id. at 468. Thus, in Gallarelli v. United States, 441 F.2d 1402 (3rd Cir. 1971), the defendant's right to counsel was infringed at sentencing and the sentence was vacated. No prejudice need be shown. See, e.g., United States, ex rel Wagner v. Myers, 234 F. Supp. 239 (E.D.Pa. 1964); see also, Hamilton v. Alabama, 368 U.S. 52 157 (1961); and White v. Maryland, 373 U.S. 59 (1963).

B.

The opinion of the Third Circuit Court of Appeals is in conformity with the law as exemplified in the decisions of cases involving similar but less egregious conduct.

In cases that do not involve wrongfully motivated attempts to subvert an accused's confidence in defense counsel, e.g., Manning, supra, Mason, supra, Moore, supra, nor intentional attempts to curtail attorney-client communications, e.g., Via v. Cliff, supra, but involve an undercover agent's discovery of attorney-client communications the decision of the Third Circuit at bar finds additional support.

In Weatherford v. Bursey, 429 U.S. 545 (1977), Weatherford was an undercover agent who, with Bursey, was charged with vandalism. Both were arrested and at the invitation of Bursey, participated in pre-trial defense discussions. None of the information gleaned by Weatherford was transmitted to the prosecutor. After conviction, Bursey filed suit under 42 USC §1983 against the agent and his superior for denial of his Sixth Amendment right to counsel. The question for the Court was whether a denial occurred. This Court found none, because no information was communicated to the prosecution. 429 U.S. at 556. Had communication occurred, a conviction can be dismissed. E.g., United States v. Levy, 577 F.2d 200 (3rd Cir. 1978); United States v. Peters, 468 F. Supp. 364 (S.D.Fla. 1979); accord, Mastrain v. McManus, 554 F.2d 813, 821 (8th Cir. 1977); see also United States v. Orman, 417 F. Supp. 1126 (D.Colo. 1976) involving D.E.A. interception of attorney-client communications.

In Weatherford, dissenting Justices Marshall and Brennan believed the record supported a denial of the Sixth Amendment and a cause of action under §1983. The language they used is, however, enlightening because the record now before the Court is even more egregious.

> [Even] . . . what occurred here [was] "the obvious thing in its mildest and least repulsive form . . . illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedure." Boyd v. United States, 116 U.S. 616, 635, 29 L.Ed 746, 6 S.Ct. 524 (1886). I cannot join in providing even the narrowest of openings to the practice of spying upon attorney-client communications.

> There are actually two independent constitutional values that are jeopardized by governmental intrusions into private communications between defendants and their lawyers. First, the integrity of the adversary system and the fairness of trials is undermined . . . . [Emp. Sup.].

Weatherford v. Bursey, 429 U.S. 545, 562 (1977).

In an earlier case, also involving attorney-client communication discovery, the Second Circuit Court of Appeals wrote:

> When conduct of a Government agent touches upon a relationship between a criminal defendant and his attorney, such conduct exposes the Government to the risk of a fatal intrusion and must be accordingly carefully scrutinized . . . . The per se rule represents a moral as well as a legal condemnation of such egregious and unequivocal conduct for which sanctions are imposed against the Government as punishment regardless of the defendant's guilt . . . .
>
> "[I]f circumstances warranted it we would not shrink from such a result." United States v. Rosner, [485 F.2d 1213, 1288 (2d Cir. 1973)].

United States v. Gardner, 518 F.2d 633, 623 (2d Cir. 1975).

United States v. Acosta, 526 F.2d 670 (5th Cir. 1976), cert. denied, 426 U.S. 920 (1976) did not involve a surruptitious and conscious effort to subvert and destroy the right to counsel and the adversary system; however, the language supports the decision in Morrison. In Acosta the prosecution and the testifying informant managed to, inter alia, cover up the deal the informant had with the prosecutor and the informant's criminal record until defense cross-examination. The trial court dismissed the charges after the conviction because of "outrageous" conduct of the D.E.A. The Circuit Court reversed the trial court because the suppression by the prosecution had no "impact on the verdict" since all was brought out by adept defense counsel. The unchecked behavior of the D.E.A. in the instant case, however,

has a deeper and more incidious impact on all verdicts. Indeed, the Third Circuit opinion herein recognized that attempts to disparage defense counsel creates the danger of courts becoming "the unwitting instrumentability through which Government agents may interfere with basic constitutional rights." United States v. Morrison, 602 F.2d at 533. Curiously, the D.E.A. in Acosta requested that the Fifth Circuit determine that the judiciary has no power to dismiss an indictment, but the wisdom of the Fifth Circuit is captured in their answer: "we need not indulge in dictum as to whether the law empowers a District Judge to dismiss an indictment . . . on account of prosecutorial misconduct. We decline the Government's invitation to do so and leave the point for the day when, and if, it arises . . . ." 526 F.2d at 675. See also, United States v. Weiss, 599 F.2d 730 (5th Cir. 1979) where agents met with defendant on matters not regarding his pending charges, an equivocation attempted in the case before the Court, but Weiss' counsel was not disparaged.

United States v. Glover, 596 F.2d 857 (9th Cir. 1979), also supports the Third Circuit's Morrison opinion. In Glover, the FBI held conversations with the defendant without the consent of the defendant's attorney.

> The facts here are clearly distinguishable from those in Manning. The most damaging interference with the attorney-client relationship there was the impression the D.E.A. agents attempted to convey that defendant's counsel was incompetent. The effects of disparaging comments about counsel, particularly where coupled with a warning that reliance on counsel's judgment will not keep the defendant out of jail, can be detrimental to the attorney-client relationship and are not easily expelled.

Id., 596 F.2d at 861.

Repeatedly, the D.E.A. rises to the occasion to intimidate, chill and destroy the constitutional rights of our citizens. How is it that their name appears again and again? One can wonder how lengthy the "citations" would be if the D.E.A.'s intials could be Sheapardized as in a computer search!

In United States v. Owen, 580 F.2d 365 (9th Cir, 1978) after conviction but before sentencing, the D.E.A. agents approached the defendant who was represented by two lawyers, one of whom gave his consent to the agents to interview the client. The purpose of the visit was to have the defendant cooperate in an investigation of one of his lawyers. Denying the defendant's request for a dismissal of charges, the Circuit Court stated that the judiciary has the power to dismiss indictments to discourage future Governmental impropriety and quoted this Court's decision in United States v. Russell, 411 U.S. 423, 431-32 (1973) that "we may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction." This language is prophetic, as it fits the current record.

Clearly had the Fifth or Ninth Circuits reviewed the record in Morrison the decision would be the same, This is because it is the correct interpretation of the importance of the right to counsel and the adversary system.[6]

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[6] In support of the proposition that the Third Circuit's opinion below conflicts with "standards established by several other circuits," (Government's Petition for Certiorari, p. 19), cases

Furthermore, the Second Circuit appears to support the Third Circuit's opinion in Morrison. In United States v. Rosner, 485 F.2d 1213 (2d Cir. 1973) a co-defendant was an informer and the defendant requested a dismissal without the showing of prejudice. Although the case deals with interception of attorney-client communications, the language relates to the more serious attempts not only to intercept but also to decimate the attorney-client relationship, stating:

> A per se rule must . . . be thought of in terms of sanction against the Government rather than as a search for truth. Illegal wiretapping may be so far beyond the bounds of Governmental propriety that it is offensive to a rule of liberty under law. (Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed 2d 576 (1967)). The use of a dummy defendant, the ultimate in the chicanery of unlawful intrusion, is cut from the same cloth. [Citations omitted]. The intrusion by a paid informer for the avowed purpose of listening to defense secrets is not different . . . .
>
> In all such cases the Government has been treated as ruthless beyond justification. It has stooped to conduct well below the line of acceptability. These strictures, while legal principles in constitutional terms, are also moral judgments. They assess the guilt not of the defendant but of the Government. The Supreme Court in the Hoffa case, considered Coplon, supra, and Caldwell, supra, so strongly urged upon us by appellant, as cases which "dealt with government intrusion of the grossest kind upon the confidential relationship between the defendant and his counsel." Hoffa v. United States, supra, 385 U.S. at 306, 87 S.Ct. at 416. When the Government is found guilty of such a charge, the dereliction is more than the bungling of the constable, in Judge Cardozo's phrase. (People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926).) It is a corrupting practice which may justify freeing one guilty person to vindicate the rule of

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are cited where the several Circuit Courts were presented with totally different facts or are related in a most tenuous way. See e.g., United States v. Jernigan, 582 F.2d 1211 (9th Cir. 1978) which deals with whether the D.E.A. must notify a subject of a wiretap; and United States v. Stanford, 589 F.2d 285 (7th Cir. 1978) dealing with pre-trial publicity, cited at p. 21 of the Government's Petition.

law for all others. See Mr. Justice Holmes dissenting in Olmstead v. United States, 277 U.S. 438, 469, 48 S.Ct. 564, 72 L.Ed 944 (1928). [Emp. Sup.].

United States v. Rosner, 485 F.2d at 1227.

Indeed, inherent prejudice can be found upon consideration of the fact that by not accepting the overtures of the agents, the respondent: (a) did not receive the benefit of leniency which was covertly promised to her by the agents; (b) the possibility of a lenient recommendation by the United States Attorney at her sentencing was lost as promised by the agents in their threats; (c) after the agents conduct was completed, all future decisions of her and her counsel become tainted in that she will never know whether she would have received a lesser sentence had she cooperated; (d) the conduct prejudiced the strength of her counsel's ability to maintain his office and execute his duties as the respondent's chosen attorney; and finally (e) the agents' threats and disparagements irreparably tainted and beclouded the respondent's right to rely on unencumbered and trustworthy advice from her counsel to an incalculable degree.

C.

The Third Circuit's rule remedies the ongoing Governmental misbehavior in the case in chief and in other reported and unreported cases.

There is a line of reasoning in factual circumstances involving interception of attorney-client communications that dismissal would be appropriate if the activity is considered "widespread." E.g., Weatherford v. Bursey, supra; cf., United States v. Broward, 594 F.2d

345, 351 (2d Cir. 1979), cert. denied, ___ U.S. ___ (1979). Keeping in mind that the aforesaid cases do not involve an attempt to decimate the attorney-client relationship, the mere existence of the cases cited in this Response Brief arguably, in itself, demonstrates widespread activity.

Indeed, the Government's Petition For Certiorari in the case before the Court implicitly admits the existence of other unreported cases. "[T]he Court of Appeals' ruling can be expected to produce significant delay in a substantial number of future criminal cases," Government's Petition, p. 10; and, "may perceptibly increase the already heavy burden on the federal criminal process by giving rise to a large number of motions . . . ." Id., p. 22. This is the same reason offered by the Government against the relief granted in Miranda v. Arizona, supra. Furthermore, the granting of relief without a showing of prejudice as referred to in Rosner, supra, is not novel. See Strunk v. United States, 412 U.S. 434 (1973); Barber v. Municipal Court, 157 Cal.Rptr. 664 (1979).

CONCLUSION

The Petition should be denied.

The opinion of the Third Circuit is correct. It is consistent with all known reported cases. The issue and question presented to this Most Honorable Court of last resort must primarily focus on our adversary system and secondarily on the position of the respondent after the intrusion. Weatherford, supra, 429 U.S. at 562. Dismissal is the only remedy otherwise the Government's behavior is sanctioned.

A reversal of the Third Circuit's decision, will sanction the behavior of the D.E.A. in this case. All Government Agencies will then be allowed to seek to dismiss those defense attorneys who do not assist the Government's investigators of criminal conduct. If the importunings of the agents are successful, defense counsel becomes an agent of the Government instead of the defendant. It opens a pandora's box recognized in this Court's language when attempts are made to make "nice calculations" as to the effect on the attorney-client relationship. Glasser v. United States, 315 U.S. 60, 76 (1942). Conceivably, the defense attorney selected by the Government may be an unwitting instrumentality of the D.E.A. One can imagine D.E.A. agents referring defendants to inexperienced or easily intimidated counsellors for their own purposes. It could also legitimize the specter of corrupted defense attorneys working directly with the D.E.A. Cf., Messelt v. Alabama, 595 F.2d 247 (5th Cir. 1979) (defense counsel asks prosecutor to increase charges against defendant so he could collect his fee).

To sanction or allow the Government to subvert a citizen's confidence in counsel of her choice, also places the entire judicial system in the hands of the D.E.A. Indeed, the courts themselves become an unwitting instrumentability in the corruption of the judicial system. This corruption is clearly exemplified in this case. The record thoroughly demonstrates that the Government lied to the Court about the involvement of their agents in the attempt to disparage the competence of defense counsel, and sought to

convince the trial court that the effectiveness of counsel was not discussed. The only reason the Government was unable to hide and cover-up the magnitude of the agents dispicable acts was due to their fear of discovery and perjury charges when they thought their conversations with the respondent were on tape. Motivated to continue the ruse, the record reveals a calculated and concerted effort to determine what was contained on the tapes by utilization of search warrants, contempt citations, threats of arrest and loss of defense counsel's license to practice (Tr, 180/App. 193a).

Thus, the Third Circuit's decision is to safeguard not only one's right to counsel, but the entire adversary system. There is no conflict with other jurisdiction. There are similar cases of outrageous Government misconduct and cases involving the interception of attorney-client communications, but they do not conflict with the facts on the record in this case. On the contrary, they support the Morrison decision.

If dismissal is not required, then we literally abandon our adversary system in favor of an inquisitorial system because when the agents do not get caught in their effort to choose defense counsel, the trier of fact receives input from only one source. Decisions will be based on only what the Government was the judiciary to know. This is not only absurd, but anathema to our sence of justice and fairplay.

Respectfully submitted,

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